IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

EAZOR EXPRESS, INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENT TO PETITION FOR REHEARING

We append hereto* the decision of the United States Court of Appeals for the Third Circuit in *United States Steel Corp.* v. *United Mine Workers of America*, et al.,

* This Memorandum was originally filed in typewritten form and the typewritten opinion of the Court of Appeals was appended thereto. The Clerk has advised us that in substituting these printed copies, reproduction of the opinion is not required.

decided March 16, 1976 (hereafter "*U.S. Steel*").[1] That decision repudiates the *reasoning* of the Court in this case on the issue of implied contractual duty (question 1(a) of the Petition), and also the *result* reached by the *Eazor* Court with respect to petitioner International on the "mass action" theory (question 1(b) of the Petition).[2]

1. The *U.S. Steel* Court held that the duty to use every reasonable means to terminate an unauthorized strike is to be implied from all no-strike promises, whether these be express or implied. In reaching this result that Court categorically rejected the express-implied distinction whereby the *Eazor* Court had distinguished Judge Parker's carefully reasoned opinion in *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 842 (C.A. 4), (see Pet. 16-20 and Pet. for Rehearing 1-2). The *U.S. Steel* court said:

> "If *Eazor Express'* reference to *Haislip Baking* can be understood as suggesting that a reasonable efforts obligation will not be implied from a no-strike obligation that is itself implied, it is mere dictum. And in context, it is far from clear that

[1] The panel consisted of Chief Judge Seitz and Judges Gibbons and Rosenn. The principal opinion (cited herein as "Op.") is that of Judge Gibbons; Judge Rosenn wrote an opinion concerning the result ("Conc. Op."), and Chief Judge Seitz filed a separate concurring (Sep. Op.") wherein he agreed with Judge Gibbons on the points pertinent here (*id.* p. 1), except possibly with respect to the mass action point (discussed at pp. 3-5, *infra*), as to which his unarticulated position may be even *more favorable* to petitioner International than the views of his brethern. Accordingly, in referring to the decision of the Court we shall refer to Judge Gibbons' opinion.

[2] These inconsistencies exist although the present petitioners unsuccessfully sought rehearing *en banc* by the court below. See Pet. App. 28a.

> Judge Maris was doing anything more than distinguishing inapposite precedent, and was actually subscribing to the truth of the proposition. In any event, because we believe that this is a distinction without a difference, we choose not to accord that dictum the force of law."

In support of the conclusion the *U.S. Steel* relied on *Teamsters Union* v. *Lucas Flour Co.,* 369 U.S. 95 and *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, following the identical analysis advanced by us at p. 17 of our Petition for Certiorari. In short, the latest word is that *Eazor's* distinction of *Haislip* was "good for this day and train only"[3] and that the law of the Third Circuit is indeed in conflict with that of the Fourth Circuit on the question whether no-strike promises, express and implied entail the duty to use every reasonable means to terminate an unauthorized strike. Not even respondent has ever disputed the public importance of this question.

2. The *U.S. Steel* decision also repudiates the holding of *Eazor* that an International union can be held liable under the "mass action" theory where the "mass" consists only of the membership of one or two of its locals. The views of Judges Gibbons and Rosenn differ with respect to the nature of the mass action theory, but on this point they are in agreement:
Judge Gibbons writes:

> "As stated by Judge Maris, union liability under this theory is imputed from the concerted activity of the membership. Consistent with theory, however, the liability must be limited to the entity

---

[3] Cf. Roberts J. dissenting in *Smith* v. *Allwright,* 321 U.S. 649, 669.

> whose membership acts in concert. In most cases, as here, that entity will be the local union. Thus absent a showing of complicity on the part of a larger union entity—the District or International Union, for example—only the local can be held liable under the mass action theory. Since there is no record evidence demonstrating District 5 or International complicity in the instant work stoppages, only the Local's liability need be considered" (Op. pp. 18a-19)

And Judge Rosenn in his separate opinion says:

> "To be consistent with the theory, however, liability must be limited to the entity, the mass of whose membership acts in concert. This is because the theory presumes that the leadership for the mass action comes from within the group that generates the unlawful action. Thus, in most cases, it will be only the local on which liability is imposed under this theory. There can conceivably also be district and international union liability if there is evidence to show complicty by officers of these entities directly or indirectly in the mass action." (Conc. Op. p. 4, footnote omitted)

In his concurring and dissenting opinion Chief Judge Seitz reaches the conclusion that the District Court in *U.S. Steel* should not have entered any order against the International or the intermediate body, the District Council. Accordingly, while he does not state whether his agreement with Judge Gibbons extends to the latter's reasoning on the mass action theory, it is clear that he, too, would not find the International liable on that theory.

The views of these three Judges reinforce our submission that it is unconscionable to subject the International in this case to a judgment exceeding $1,000,000

before interest for the actions of a miniscule part of its total membership. And since we do not know from the opinions in *U.S. Steel* whether the striking miners in that case constituted all or the major part of the membership of the defendant local (as to which the mass action theory was sustained), it may well be that the reasoning which we have quoted is likewise inconsistent with the imposition of liability on the defendant locals in *Eazor* for the actions of a "mass" consisting of 2% of the members in one instance and 6% in the other. See Pet. 29-30. We also deem it of significance that while the opinions of Judge Gibbons and Rosenn treat with the mass action theory in greater depth than did the opinion in *Eazor,* they nevertheless adhere to the universal pattern of prior opinions which approve that theory in paying no attention whatsoever to that Congressional intent in enacting §§ 301(b) and (e). A court which does so, must reject the mass action theory; we submit that the time has come for this Court to say so.

3. The need to call the *U.S. Steel* opinion to this Court's attention before our petition for rehearing is acted upon, makes it impossible for us to discuss in the detail in which the subject deserves, why, in light of this development, the Court should reverse its previous decision and grant certiorari. The following propositions, do, however, come immediately to mind:

(a) While the grant of certiorari on rehearing is admittedly unusual, it is no more extraordinary than an intervening decision whereby the Court which rendered the judgment of which review is sought disavows the analysis by which it previously avoided a conflict in the Circuits, and simultaneously reverses with respect to at least one of the parties an alternative theory of liabil-

ity. A case more clearly following within the intent of Rule 58(2) of this Court could hardly be imagined.

(b) Since the Third Circuit's decision in *U.S. Steel* is in direct conflict not only with *Haislip,* but with the decision of the Fifth Circuit in *U.S. Steel Corp.* v. *United Mine Wkrs. of Am.,* 519 F.2d 1249, 526 F.2d 377 (Pet. 17, n. 9, Pet. for Rehearing 1-3) and since those cases appear to be part of a running battle between those adversaries, it is inevitable that certiorari will be sought, and highly probable that it will be granted, in those cases We submit that if review is granted in those cases it should be granted in this case also. This would assure that a decision either way is dispositive of the contract question with respect to both express and implied no-strike obligations, and that the defendant in the present case will not be required to pay this enormous judgment on a legal theory subsequently repudiated by this Court as contrary to the Congressional intent. This Court has, on occasion, granted certiorari on an untimely petition for rehearing, or *sua sponte* to achieve "uniformity in the application of the principles announced by this Court." *United States* v. *Ohio Power Co.,* 353 U.S. 98. See also, in addition to the cases cited *id.* at 99, *United States* v. *Maryland,* 382 U.S. 158.

(c) Lastly, we leave this Court with a question: If the Court of Appeals had squarely acknowledged in *Eazor* that its creation of a duty to use every reasonable means to terminate an unauthorized strike is in conflict with the law as declared by the Fourth Circuit, and that the mass action theory is an improper predicate for International liability, would certiorari have been denied in this case?

CONCLUSION

For the reasons stated herein and in our prior submissions, the Petition for Rehearing should be granted and certiorari should be granted.

Respectfully Submitted,

SIDNEY DICKSTEIN
GEORGE KAUFMANN
1735 New York Avenue
Washington, D.C. 20006

Attorneys for Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

BEN PAUL JUBELIRER
2000 Lawyers Building
Pittsburgh, Pennsylvania 15219

Attorney for Petitioner Local No. 249

EUGENE GREEN
602 Stambaugh Building
Youngstown, Ohio 44503

Attorney for Petitioner Local No. 377